89-1083

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ESTO, INC., UNITED PACIFIC INSURANCE COMPANY and RELIANCE INSURANCE COMPANY,

Petitioners,

vs.

C.E. CALLAHAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, C. E. CALLAHAN, respectfully requests that this Court deny the Petition for Writ of Certiorari filed

by Esto, Inc. (aka H.A. Ekelin and Associates), United Pacific Insurance Company and Reliance Insurance Company that seeks review of the Ninth Circuit's Opinion in this case. That Opinion is reported at 884 F.2d 1180.

QUESTIONS PRESENTED

1. Does either the Miller Act or the case of F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Company, Inc., 417 U.S. 116 (1974) bar recovery of attorney's fees when provided for in a contract between a California prime contractor and a California subcontractor working on a Federal project in California?

2. Does the mere submission of jury instructions waive Federal Rule of Civil Procedure 51's requirement of a specific objection when the trial court refuses to

give an instruction?

REASONS WHY THE WRIT SHOULD BE DENIED

The Rules of the Supreme Court of the United States Rule 17 govern the consideration on certiorari. Rule 17.1 provides that review of a Writ of Certiorari is purely discretionary and will only be granted when the reasons are special and important. There are no special and important reasons to grant review in the instant case.

The decision by the Ninth Circuit does not conflict with any other Opinion of this Court when it considered the attorney's fees argument because there was a contract provision that allowed for attorney's fees on behalf of the petitioners. Pursuant to California law, Civil Code Section 1717 required that the respondent be allowed to

recover attorney's fees when he was successful.

Furthermore, the prevailing rule concerning refusal or failure to give instructions is that that party requesting the instructions must specifically object to the trial court (see Wright's Federal Practice and Procedure, Sections 2553 and 2554, pp. 639, 646). As this Honorable Court established in Palmer v. Hoffman, 318 U.S. 109 (1943), the provision of Rule 51 that no party may assign as error the giving or failure to give an instruction unless he distinctly presents the trial court his ground for objection is salutary and conforms to the practice generally followed in appellate procedure [emphasis added].

STATEMENT OF THE CASE

Petitioners' facts (see Petition for Writ of Certiorari pp. 4-7) are inaccurate. The Opinion of the United States Court of Appeal for the Ninth Circuit contains an accurate history of the case and the facts (see United States ex rel. Reed v. Callahan, 884 F.2d 1180 (9th Cir. 1989); Appendix to Petition pp. 5-8).

ARGUMENT

I

THE F.D. RICH CASE IS NO BAR TO RECOVERY OF ATTORNEY'S FEES WHEN THERE IS A CONTRACT PROVISION ALLOWING THESE FEES.

Petitioners' assertion that the case of F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Company, Inc., 417 U.S. 116 (1974) bars recovery of attorney's

fees is wrong and also contrary to the cases including F.D. Rich Co., supra.

This Honorable Court in F.D. Rich Co., supra, upheld the "American Rule" denying attorney's fees to Miller Act claimants unless there was a contract provision for attorney's fees. This Court cited with approval to Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967) that attorney's fees "are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor" (F.D. Rich Co., Inc., supra, at 126).

Attorney's fees are recoverable pursuant to contract language providing for their recovery (United States ex rel. Micro-King Company v. Community Science Technology, Inc., 574 F.2d 1292 (5th Cir. 1978); United States ex rel. Carter Equipment Company v. Morgan, Inc., 554 F.2d

164 (5th Cir. 1977); Sherman v. Carter, 353 U.S. 210 (1957)).

The subcontract between the parties involved in this litigation provided attorney's fees for the petitioners under what amounts to a self-help provision. The petitioners controlled the contract, all of the money available and they refused to pay Callahan what was due. Petitioners tried to accomplish by artful maneuvering and clever drafting the overturning of the California attorney's fees statute, Civil Code Section 1717, that makes any provision for attorney's fees applicable to the entire contract.

The Ninth Circuit Court of Appeal has correctly construed California law that governs the contract between a prime contractor and a subcontractor (see United States ex rel. Building Rentals Corporation

v. Western Casualty and Surety Company, 498 F.2d 335, n. 4 (9th Cir. 1974)). California law requires that as long as there is an attorney's fees provision, no matter how unilateral and limited, attorney's fees may be collected on the entire contract by the party who is successful.

California Civil Code Section 1717 as amended in 1983 in pertinent part states:

> "[w]here a contract provides for attorney's fees ... such provision shall be construed as applying to the entire contract ...." (California Civil Code Section 1717(a), West's 1985 [emphasis added]).

As the Ninth Circuit Court of Appeal stated in the instant case "the [California] Legislature intended this

amendment to counter the restrictive reading of fees clauses .... (Boyd v. Oscar Fisher Company, 258 Cal.Rptr. 473, 479 (California Court of Appeal 1989); 7B Witkin, California Procedure, Judgment, Section 152 (3rd Ed.))."

The very purpose of the California statute is to provide a mutuality of remedies when the contract provision is one-sided and also prevent oppressive use of one-sided attorney's fees provisions (Reynolds Metal Company v. Alperson, 25 Cal.3d 124, 128 [158 Cal.Rptr. 1, 3] (1979)).

The Opinion of the Ninth Circuit Court of Appeal was and is correct and the Petition for Writ of Certiorari should be denied.

II

FEDERAL RULE OF CIVIL PROCEDURE 51 REQUIRES A SPECIFIC OBJECTION TO THE TRIAL COURT WHEN THE COURT REFUSES TO GIVE AN INSTRUCTION AND PETITIONERS' FAILURE TO OBJECT BARS THAT ISSUE ON APPEAL.

Federal Rule of Civil Procedure 51 provides that:

> "No party may assign as error ... the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

The mere tender of an alternative instruction without objection to some specific error in the trial court's charge

or explaining why the proffered instruction better states the law does not preserve any error for appeal (Johnson v. Hauser, 704 F.2d 1049, 1051 (8th Cir. 1983)). A party must be specific in objecting to the Court's failure to give instructions. He must bring into focus for the trial court precise notice of the alleged error (Charles A. Wright, Inc. v. F.D. Rich Co., 354 F.2d 710, 713 (1st Cir. 1966), cert. denied 384 U.S. 960; Western Transmission Corp. v. Colorado, Inc., 376 F.2d 470, 474 (10th Cir. 1967)).

The failure to object to the omission of instructions precludes the party from raising the issue on appeal (U.S. v. Warner, 855 F.2d 372, 374 (7th Cir. 1988)).

In the instant case both parties offered instructions to the Court. The trial judge went through each and every

instruction hearing any objections and stated his reasons why he was giving or not giving the instructions. When the judge stated he was not giving the four instructions petitioners complain about, the petitioners stood mute and failed to comply with Rule 51 (see Ninth Circuit Court of Appeal Opinion, Appendix pp. 10-11).

Petitioners' failure to offer any specific grounds for the instructions as to why they were better or that the Court's failure to give the instructions might be erroneous or mislead the jury, prevents petitioners from raising this issue on appeal.

It is also interesting to note that petitioners' Opening Brief that raised the issue about jury instructions contained no citation to any case law or any statute or

any rule (see Cross-Appellants' Opening Brief pp. 42-44).

Petitioners never raised the specific issue they now raise in the Petition for Writ of Certiorari until petitioners filed the Petition for Rehearing with the Court of Appeal.

Respondent clearly relied on Rule 51 and its requirement for objection even when an instruction is refused (see Cross-Appellant's Answering Brief pp. 36-40). Petitioners chose to ignore this argument in their Reply Brief.

The issue itself has no merit but petitioners' continued failure to raise the issue until they filed a Petition for Rehearing fails to preserve it for any purpose.

CONCLUSION

The Petition for Writ of Certiorari should be denied because the United States Court of Appeals for the Ninth Circuit Opinion in the instant case is correct.

1. Attorney's fees, when provided for in the subcontract between a California prime contractor and a California subcontractor, are allowed no matter how one-sided on behalf of the prime contractor and they are recoverable by the subcontractor when he prevails. This Honorable Court has never rejected the American Rule on attorney's fees.

2. Petitioners' continued failure to specifically object to the trial court's refusal to give its proffered instructions prevents the issue from being raised on appeal, especially when petitioners failed to raise that specific issue that they now

raise until petitioners filed the Petition for Rehearing.

Dated: January 11, 1990.

Respectfully submitted,

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